NO. 455650

COURT OF APPEALS, DIVISION OF THE STATE OF WASHINGTON

THE CITY OF BURLINGTON, a Washington Municipal Corporation,

Appellant,

v.

THE WASHINGTON STATE LIQUOR CONTROL BOARD, a Washington Agency; HAKAM SINGH AND JANE DOE SINGH, and the marital community composed thereof; and HK INTERNATIONAL, LLC, a Washington Limited Liability Company,

Respondents.

BRIEF OF RESPONDENT WASHINGTON STATE LIQUOR CONTROL BOARD

ROBERT W. FERGUSON
Attorney General

R. JULY SIMPSON, WSBA 45869
Assistant Attorney General

MARY M. TENNYSON, WSBA 11197
Senior Assistant Attorney General

Office ID 91029
PO Box 40110
Olympia, WA 98504-0110
360-753-2702

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

I. INTRODUCTION

In November 2011, Initiative 1183 (I-1183) passed by a majority vote. The new law, commonly referred to as the law "privatizing" liquor sales in Washington State, directed the Washington State Liquor Control Board (Board) to cease liquor sales no later than June 1, 2012, and to auction off the right to apply for a liquor license at the locations of the former "state-owned" stores. *See* ch. 2, Laws of 2012, Initiative 1183, at §102(2), (3), and (4)(c) *codified as* RCW 66.24.620; §103 *codified as* RCW 66.24.630 ("Spirits retail license"). Hakam Singh purchased such a right at auction and applied to relocate the license pursuant to the process set up by the Board. The City of Burlington ("City") objected to the issuance of the license.

The Thurston County Superior Court correctly held that the City of Burlington did not have standing for judicial review of the Board's action because the City could not demonstrate that it suffered a concrete injury in fact or that the court could grant relief that would redress any injury. Even if the City had standing, the Board's grant of the relocation of the license was appropriate. Similarly, the court did not abuse its discretion by refusing to allow additional evidence after the initial briefing and oral argument was complete.

The superior court's decision was consistent with Washington law, and the Board's actions were consistent with its authority and reasonable interpretation of the law. This Court should affirm the superior court's decision dismissing the City's petition for review.

II. COUNTERSTATEMENT OF THE ISSUES

1. Where the City provided no evidence that it was or likely would be prejudiced by the Board's decision to grant a liquor license to a store that has sold beer and wine since 2003 with no underage sales violations since 2008 and therefore no relief could be granted to redress any injury, did the City lack standing to seek judicial review under the Administrative Procedure Act?

2. Did the superior court abuse its discretion in excluding additional evidence submitted by the City after oral argument when the court had solely requested supplemental briefing on the issue of standing?

III. STATEMENT OF THE CASE

A. Initiative 1183 Directed The Board To Sell The Operating Rights Associated With Former State Liquor Store By Public Auction

Initiative 1183 ended the Board's role as the State's sole retail seller and distributor of spirits and created a licensing scheme for private parties to sell spirits in Washington State. I-1183 § 101 (*codified as* Finding *in* RCW 66.24.620); §§ 102–105 (*codified as* RCW 66.24.620, .630, .640, .055). The Initiative directed the Board to cease buying or

selling liquor[1] as of June 1, 2012, to auction its assets used to sell liquor for the "maximum reasonable value," and to license private businesses to sell spirits to retail customers. I-1183 § 102–103. Section 102(4)(c) of I-1183 contains other mandates to the Board:

> The board must sell by auction open to the public the right at each state-owned store location of a spirits retail licensee to operate a liquor store upon the premises. Such right must be freely alienable and subject to all state and local zoning and land use requirements applicable to the property. Acquisition of the operating rights must be a precondition to, but does not establish eligibility for, a spirits retail license at the location of a state store and does not confer any privilege conferred by a spirits retail license. Holding the rights does not require the holder of the right to operate a liquor-licensed business or apply for a liquor license.

Thus, the initiative directed the Board to auction off "the right" to operate a liquor store on the premises of each "state-owned" liquor store location.

In general, the new spirits retail license could only be granted at premises with a minimum of 10,000 square feet of retail space, except the Board could not deny a license to someone who purchased liquor store operating rights at the auction on the grounds of location, nature, or size of

[1] "Liquor" is defined in RCW 66.04.010(25) as including alcohol, spirits, wine, and beer. This brief uses the term "liquor" to refer to spirits, wine, and beer collectively. If reference to one of the individual types of liquor is intended, the reference will be to spirits, wine, or beer, respectively.

the premises. I-1183 § 103(3)(a), (c) (*codified as* RCW 66.24.630(3)(a), (c)).[2]

The Initiative mandated that the Board auction the right to sell spirits at each "state owned store location," and that the Board must obtain "maximum reasonable value." I-1183 § 102(4)(b), (c) *codified as* RCW 66.24.620(4)(b), (c). The state, however, did not own any liquor stores and, rather, under authority of former RCW 66.08.050(1)–(5),[3] the Board leased "premises required for the conduct of the business."[4] Prior RCW 66.08.050(4), attached as Appendix 1. Faced with this incongruity, the Board formulated a policy to effectuate the language and intent of the statute. BIP-04-2012, CP 136–37.

The Board recognized that requiring each potential bidder at the auction to obtain from the landlord a Letter of Intent to lease the premises to the bidder in order to be eligible to bid would be burdensome on both

---

[2] RCW 66.24.630(3)(c) provides in relevant part:

> The board may not deny a spirits retail license to an otherwise qualified contract liquor store at its contract locations or to the holder of former state liquor store operating rights sold at auction under RCW 66.24.620 on the grounds of location, nature, or size of the premises to be licensed.

[3] A copy of the statute as it read prior to the effective date of I-1183 is attached as Appendix 1.

[4] The Board also appointed persons as contract store managers, under authority of RCW 66.08.050(2). The former contract store managers were "grandfathered in" so that they could seek a spirits retail license for their business, even if the size of the premises they used to fulfill their contract with the Board was less than 10,000 square feet. I-1183, §103(3)(c).

the potential bidders and the Board's landlords, and that some landlords might be unable or unwilling to lease the location to a new tenant. AR 3, 4, 7, 8 and CP 136, Ex. A of Decl. of Mary Tennyson. The Board thus determined that the auctioned off "right" would allow the successful bidder to apply for a spirits retail license at an alternate location that is smaller than the 10,000 square foot minimum size if the right holder could not reach an agreement with the landlord. CP 137 (Board Interim Policy 04-2012); *See also* I-1183, § 103(3)(a) and (c), *codified as* RCW 66.24.630(3)(a), (c).

To fulfill its duty to implement I-1183, the Board created a process to auction off the right to operate a liquor store at the former state liquor store locations. AR 1–11. The Board also drafted "Terms and Conditions" of the auction process to allow the auction winner to relocate a former state store within a one-mile radius of the original location if the winner could not negotiate a lease. AR 8. The Board adopted this term as an interim policy and as a prequel to formal rulemaking to adopt the relocation policy in rule form. BIP-04-2012, CP 136–37.[5]

[5] The Board is currently in the process of rule-making. Wash. St. Reg. 13-08-088, *available at* http://apps.leg.wa.gov/documents/laws/wsr/2013/08/13-08-088.htm.

B. HK International Applied To Relocate Its Spirits Retail License

HK International, LLC, owned by Hakam Singh, won the operating rights associated with State Store #152, which was located within the City of Burlington. AR 15. The Board's Terms and Conditions required the successful bidder to pay the winning bid price to the Board no later than May 7, 2012. AR 4. The bidder also had to present a Letter of Intent from the landlord to lease the premises or notify the Board of its intention not to occupy the premises so the Board could determine if the bidder was liable for the "fixture removal fee" charged if the bidder did not occupy the premises leased by the Board. AR 11–12.

On May 7, 2012, Mr. Singh notified the Board that the landlord refused to lease to him and, therefore, he wished to relocate the "operating right" to "Skagit Big Mini Mart," a location half a mile away. AR 23. Mr. Singh, DBA HK International, LLC, had been licensed by the Board since 2003 to sell beer and wine for off-premises consumption at the proposed location. *Id.* Pursuant to the auction Terms and Conditions, the Board granted the request after determining it was within one mile of the former state store location. AR 23–27.

HK International applied for a spirits retail license at the new location. The Board is required to give notice to a city or town prior to the

issuance of a new or renewal license within that city or town. RCW 66.24.010(8). The Board must also give written notification to "public institutions identified by the board as appropriate to receive such notice, churches, and schools within five hundred feet of the premises to be licensed."[6] RCW 66.24.010(9).

Accordingly, the Board issued a notice to the City of Burlington, informing the City of the application. Consistent with statutory requirements, the notice stated that if the City objected to the license it "MUST attach a letter to the Board detailing the reason(s) for the objection and a statement of all facts on which your objection(s) are based." AR 36; *see* RCW 66.24.010(8)(d) (requiring that written objections include a statement of all facts upon which such objections are based).

The City objected to the location and attached a three-page letter. AR 36–39. The City's letter primarily addressed its belief that the Board did not have the authority to relocate the license. *Id.* The final two paragraphs addressed its specific objections to the location itself:

> Moreover, we also observe that the proposed location is the site of numerous activities requiring law enforcement

[6] The City argues in its Statement of the Case that RCW 66.24.010(9) required the Board to give notice to the City of the license application due to the existence of a park nearby the proposed location. Br. of Appellant, 13. Not only is this a legal argument improperly included in the Statement of the Case, RAP 10.3(a)(5), but as explained below it is incorrect and relies on excluded evidence.

> involvement. The Burlington Police Department has logged many calls to the proposed license location, reflecting the high level of crime that occurs at the licensee's business.
>
> Finally, we believe a liquor store is incompatible with the land use in the area, and particularly incompatible with the Burlington High School, which is situated just beyond 500 feet from the entrance to the proposed location. High-school aged children frequent this area on their way to or from school, and many purchase soft drinks, candy, ice cream, and other products typically available at a convenience store. Adding liquor to the products sold at this location will necessarily bring children into frequent close contact with those individuals who commit the crimes that plague the Skagit Big Mini Mart.

AR 39. The City provided no documentation of the "numerous activities requiring law enforcement involvement" or how the proposed location may have been connected to those activities. *Id.* Similarly, while asserting that the Burlington Police Department logged many calls, the City provided no explanation or documentation as to the nature of those calls, the time period involved, or the connection those calls had specifically with the store. *Id.*

The Board reviewed the complete tobacco and liquor violation history of the proposed location. AR 33–35. The most recent violation occurred in April 2008. AR 43. Between April 2008 and August 2012, the Board conducted 47 Compliance and Premises Checks, 18

surveillances, and multiple complaint investigations of the licensed location with no further violations resulting. AR 43–48.[7]

The Board's Licensing Director reviewed the report of the Licensing Division staff who investigated the application which included the City's letter objecting to the license. AR 34–35. The Licensing Director provided the City with a Statement of Intent to Approve Liquor License Over the Objection of the City of Burlington, which stated in part:

> 3.2 In examining the record, there have been no liquor violations at the existing grocery store licensed premise for the past four years and several compliance checks conducted by the Liquor Control Board resulted in no sale.
>
> 3.3 The City did not demonstrate any conduct that constitutes chronic illegal activity as defined by RCW 66.24.010(12) at this time.
>
> 3.4 The challenge of the board's interpretation of I-1183 is not grounds for license denial.
>
> 3.5 The City of Burlington's objection does not conclusively link the licensee and areas under the licensee's control to the information cited in the city's objection.

AR 28–31. The Board found the City's objection lacked support and exercised its discretion not to hold a hearing based on the written objections. *See* RCW 66.24.010(8)(d) (stating that Board "may in its discretion" hold a hearing regarding a city's objection). The Board

[7] *See* WAC 314-31-005 and 015. In a "compliance check, a liquor enforcement officer, uses an underage person who is trained and paid by the Board, to attempt to purchase liquor from a licensed location. The Board conducted a compliance check at the location at issue as recently as August 2, 2012, and no sale was made. AR 48. The Board's decision to grant the spirits retail license was finalized on September 11, 2012.

reviewed the Licensing Director's decision, and approved the application. AR 49–53.

The City filed a Petition for Judicial Review in Thurston County Superior Court, seeking review of the Board's decision to grant the relocation license. CP 5–13. The Board filed the certified administrative record, and the City did not seek to supplement the record or to introduce additional evidence in support of its objection to the location. The parties filed briefs and participated in oral argument on July 19, 2013. After oral argument, while discussing the date by which she might provide the parties with a written decision, Judge Schaller noted that she would accept up to five pages to "supplement the record on the issue of standing on the briefing," and set a date by which it should be received by the court. 7/19/2013 Hearing, RP 40. The Board filed a Supplemental Brief on Standing. CP 182–187. The City filed no briefing, but submitted three declarations. CP 153–172. The Board then filed a Motion to Strike the declarations as improper and an untimely attempt to supplement the record. CP 188–192. The court granted the Board's Motion to Strike, finding it was too late for the City to supplement the factual record. The court also clarified that its request after the July 19 oral argument had been for briefing on the issue of standing, not factual supplementation of the record. 8/23/2013 Hearing, RP 23.

The superior court issued findings of fact and concluded supplementation of the record was improper, the City lacked standing to bring the challenge, and the Petition for Review should be denied. CP 221–225. This appeal followed.

IV. ARGUMENT

The Court should affirm the superior court's order of dismissal because the City did not suffer the requisite injury to establish standing to file a petition for judicial review under the Administrative Procedure Act (APA). Additionally, the superior court properly exercised its discretion in declining to consider declarations the City submitted because they were submitted after oral argument and, under the APA, judicial review is limited to the agency record and can be supplemented only under limited circumstances. Even if the City had standing, the Board appropriately granted the relocation of the license under its interim policy.

A. The City Lacked Standing To Seek Judicial Review Under The Administrative Procedure Act

The City lacked standing to seek judicial review under the Administrative Procedure Act (APA) as it made only claims that are hypothetical and conjectural. The City alleged only that adding the sale of spirits to a store that has sold beer and wine for many years with no underage sales violations since 2008 would contribute to youth access to alcohol and require additional law enforcement resources. As such, the

City failed to establish the elements of standing to receive the relief it requests in this action.

Jurisdictional issues are questions of law subject to de novo review. *Conom v. Snohomish Cnty*, 155 Wn.2d 154, 157, 118 P.3d 344, 345 (2005). When reviewing the question of standing this Court stands in the same position as the superior court. *Patterson v. Segale*, 171 Wn. App. 251, 257, 289 P.3d 657, 660 (2012). It is the "person seeking judicial review of an agency action who bears the burden of establishing standing to obtain judicial review." *KS Tacoma Holdings, LLC v. Shorelines Hearings Bd.*, 166 Wn. App. 117, 127, 272 P.3d 876 (2012), *review denied*, 174 Wn.2d 1007, 278 P.3d 1112 (2012) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992.)

The City filed a Petition for Judicial Review of an agency action under the APA, chapter 34.05 RCW. Under the APA, a person has standing to seek judicial review of agency action "if that person is aggrieved or adversely affected by the agency action," which means:

> (1) The agency action has prejudiced or is likely to prejudice that person;
> (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
> (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that

person caused or likely to be caused by the agency action. [1988 c 288 § 506.]

RCW 34.05.530 (emphasis added). The first "prejudice" prong and the third "redressability" prong are together referred to as the "injury-in-fact" test. *Allan v. Univ. of Wash.*, 140 Wn.2d 323, 327, 997 P.2d 360 (2000). Regardless, each prong must be analyzed independently and each prong must be met. The City failed to establish that the agency action prejudiced it, or was likely to prejudice it, and that a judgment in its favor would redress any injury. The superior court thus properly dismissed its petition for lack of standing.

1. The City has failed to establish prejudice or likely prejudice

The first prong of the APA standing test requires a showing that "[t]he agency action has prejudiced or is likely to prejudice that person." RCW 34.05.530(1). This requires allegations demonstrating the agency decision has caused the person to be "specifically and perceptibly harmed." *Trepanier v. City of Everett*, 64 Wn. App. 380, 382–83, 824 P.2d 524 (1992). An "immediate, concrete, and specific injury" must be shown where a threatened injury, rather than an existing injury, is alleged. *Id.* at 383 (citing *Roshan v. Smith*, 615 F. Supp. 901, 905 (D.D.C. 1985)). "If the injury is merely conjectural or hypothetical, there can be no standing." *Id.* (citing *United States v. Students Challenging Regulatory*

Agency Procedures (SCRAP), 412 U.S. 669, 93 S. Ct. 2405, 668–89, 37 L. Ed. 2d 254 (1973)). Furthermore, the injury may be "neither imaginary nor speculative." *Allan*, 140 Wn.2d at 332.

The City failed to establish that it did or would suffer any more than a conjectural or hypothetical injury from the Board's action. Where it alleged only a threatened injury from the relocation of the liquor license operations, it needed to establish an "immediate, concrete, and specific injury." *Trepanier*, 64 Wn. App. at 383. It failed to do so.

In its written objection, the City primarily argued the Board lacked authority to allow the relocation, I-1183 was unambiguous (as allegedly proved by the voter's pamphlet), and that the voter's pamphlet supported the claim that "a liquor store may not be operated from a convenience store" (a limitation which is found nowhere in the statute). AR 37–39. The City concluded its letter with two final paragraphs specifically addressing two bases for its objection with regard to the proposed location. AR 39. The City wrote that the "proposed location is the site of numerous activities requiring law enforcement involvement. The Burlington Police Department has logged many calls to the proposed license location, reflecting the high level of crime that occurs at the licensee's business." AR 39.

First, the City claims it was injured due to the "high level of crime" associated with the location. However, no facts, data, statistics, reports, declarations or records of any kind were attached to bolster the City's allegations. Nor was any connection between the calls to law enforcement and the applicant's operations at the premises made (as opposed to traffic stops using the store parking lot as a locale, for example). Neither was any connection demonstrated between the alleged law enforcement involvement and the beer and wine sold at the store since 2003. In short, the City did not show an immediate, concrete, and specific injury required to meet their burden to show standing.

Second, the City claims it was injured based on its opinion that the liquor store was "incompatible with the land use in the area" due to a high school located more than 500 feet from the location. AR 39.[8] On the one hand, the City claimed high-school students already purchase items such as soft drinks, candy and ice cream from the store, and then on the other suggested that adding the sale of spirits to the store "will necessarily bring children into frequent contact with those individuals who commit the crimes that plague the Skagit Big Mini Mart." *Id.* The City did not offer

[8] Had the school been located within 500 of the proposed location the Board would have been required to give "due consideration" and provide written notification to the school. RCW 66.24.010(9)(a). The Board would not have been able to issue the license if the school had objected. *Id.* Here, the school was not located within 500 feet of the proposed location, the City merely objected due to the fact that the proposed location was closer than its original location. AR 39.

then and does not argue now how adding spirits to the store would change the current dynamics between children who already frequent the store and the alleged "individuals who commit the crimes." *Id.* The conclusion requires leaps in logic and unfounded inferences and falls far short of the concrete and specific injuries required to show standing.

Next, the City improperly argues in its brief that it is prejudiced by the fact that the location is "adjacent to a park where drinkers can congregate, next to multifamily housing" and that the Board was required to give notice to the City due to the park. Br. of Appellant, 13 and 27. This argument should be stricken for several reasons. First, it was not raised below and may, therefore, not be raised on appeal. RCW 34.05.554. Second, it relies on evidence stricken from the record. CP 153–162, 8/23/2013 Hearing, RP 23. Third, even if the Court considers the argument, the statute does not require notice to all public institutions, as the City argues, but only to those "identified by the board as appropriate to receive notice." RCW 66.24.010(9)(a). Fourth, the City does not allege that it owns the park thus requiring notice (if notice were mandatory) or deemed appropriate to receive notice. Fifth, assuming the City in fact owns the park and the park was appropriate to receive notice, the city already received notice of the license application under RCW 66.24.010(8) making notice under (9) redundant.

The City argues it will be required to dedicate greater amounts of law enforcement resources to prevent youth access to alcohol, based on the statements of Liquor Control Officer Johnson. Br. of Appellant, 35. Officer Johnson stated she has seen "a stream of kids from the high school go into the store," and concludes stating she didn't see any come out with beer, but that the beer could have been concealed. AR 41. Officer Johnson also states that "[a]s a liquor officer and a parent I am concerned a spirits license for this premises is an invitation to add to the serious problem of youth access to alcohol." *Id.* The City claims Officer Johnson "reported that minors buy alcohol at the Mini-Mart 'all the time.'" Br. of Appellant, 33. However, the statement was actually: "One of the Investigative Aids I work with goes to that high school and he says he knows kids who buy alcohol there all the time,'" a double, or potentially triple, hearsay statement. AR 41.

Based on these concerns, the City argues it "will be compelled by the WSLCB's decision to dedicate additional law enforcement resources to ensure that a convenience store selling liquor in close proximity to the City's high school does not result in youth obtaining liquor through theft or deception." Br. of Appellant, 35. However, Officer Johnson's statement merely states concerns and conjecture. This does not amount to an immediate, specific, and concrete injury, and thus does not establish

standing. Nor does it amount to "chronic illegal activity" associated with the applicant's operation of the premises, which the Legislature has recognized as appropriate grounds for denial of a liquor license. *See* RCW 66.24.010(2), (12).

In contrast to the speculation offered by the City, the violation history of the location shows the location has been under scrutiny and close surveillance since its most recent violation in April 2008. AR 43. Between April 2008 and August 2012, the Board conducted 47 Compliance and Premises Checks, 18 surveillances, and multiple complaint investigations with no further violations resulting. AR at 43–48. The compliance checks and surveillances show contact on a nearly monthly basis (with contact often occurring multiple times in a month) with no underage sales or violations of any kind. Id.

Based on these facts, the City's claimed prejudice is not only "conjectural or hypothetical" it is imaginary and speculative. As the Statement of Intent to Approve Liquor License Over the Objection of the City of Burlington stated: the City "did not demonstrate any conduct that constitutes chronic illegal activity as defined by RCW 66.24.010(12)" and the "objection does not conclusively link the licensee and areas under the licensee's control to the information cited in the city's objection." AR 28–31. The City failed to demonstrate "chronic illegal activity" and failed to

demonstrate the illegal activity alleged in its objection is linked to HK International's operation of the location or its current sales of beer and wine such that the addition of the sale of spirits would exacerbate any existing issues. The City thus failed to satisfy the statutory requirements that could have been grounds for the Board to deny the license application, which may have established the necessary injury to seek judicial review under the APA. The City's claims that additional law enforcement would be required if a spirits retail license were granted, or that any other prejudice would be caused, are conjectural, hypothetical, imaginary and speculative. The order of dismissal for lack of standing should be affirmed.

2. The City cannot establish that a judgment in its favor would "redress the prejudice" it suffered

To establish standing under the APA, a party also must prove that "[a] judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action." RCW 34.05.530(3). Redressability requires a demonstration that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *KS Tacoma Holdings*, 166 Wn. App. at 129 (2012). Because the City failed to establish any prejudice or likely prejudice, it cannot demonstrate that a court could

substantially redress any prejudice. Even assuming it proved a concrete injury, the City further fails to establish that a judgment in its favor would redress any prejudice suffered because the alleged crime, the presence of high school aged children and the sales of wine and beer would remain unchanged even if the Board denied HK International's spirits retail license.

The City alleges the proposed location "is the site of numerous activities requiring law enforcement involvement" and that high school students frequent the Skagit Big Mini-Mart such that "[a]dding liquor to the products sold at this location will necessarily bring children into frequent close contact with those individuals who commit the crimes that plague the Skagit Big Mini Mart." AR 39. The City also claims that it "will be compelled by the WSLCB's decision to dedicate additional law enforcement resources." Br. of Appellant, 35.

The City fails to allege or explain how adding spirits would become the logical link to bring the children in contact with crime. The City alleges that both elements are already present at the proposed location. And the licensee already sells beer and wine at the premises. AR 33. Thus, a denial of the license would not redress the City's claimed prejudice.

The City, therefore, fails to make a showing that a denial of the license would substantially eliminate or redress the alleged problem. A speculative injury cannot be redressed.

3. The City incorrectly states that the Zone of Interest prong is the most significant

The City incorrectly declares the zone of interest prong "the most significant element" and argues that "[a]s party to the administrative proceeding, the City *was entitled to standing to obtain judicial review of an adverse administrative order without being required to meet all of the normal redressability and immediacy requirements of the 'injury-in-fact' requirements of 34.05.530."* Br. of Appellant, 25–27 (emphasis added). All three elements must be satisfied for a party to establish standing. The City cannot establish standing to seek APA judicial review simply because the Board was required to give it notice of the proposed license location and consider its objections.

The City is correct that RCW 66.24.010 provides that the issuance of a liquor license "requires the WSLCB to seek comment from cities and towns before issuing a license." Br. of Appellant, 26. However, the Board is clearly allowed to grant a liquor license despite an objection from the local government and just as clearly has the discretion to grant or deny the local government a hearing. RCW 66.24.010(9)(d). As the Court of

Appeals has held, standing to participate in one part of the process does not create an automatic right to judicial review: "A party's standing to participate in an administrative proceeding, however, is not necessarily coextensive with standing to challenge an administrative decision in a court." *Patterson v. Segale*, 171 Wn. App. 251, 257, 289 P.3d 657 (2012) (citing, e.g., *Med. Waste Associates, Inc. v. Maryland Waste Coalition, Inc.*, 327 Md. 596, 611, 612 A.2d 241, 249 (1992)). Rather, it remains the task of the reviewing court to determine whether the City now has standing to seek judicial review of the Board's decision. *Patterson v. Segale*, 171 Wn. App. 251, 257, 289 P.3d 657 (2012). Standing requires a person to establish they were "aggrieved or adversely affected by the agency decision. This requires a showing of an injury in-fact." *Patterson*, 171 Wn. App. at 253–54.

Here, the City failed to establish the first and third prongs of the standing requirements and, thus, has failed to meet its burden.

4. The City's remaining arguments are meritless

The City makes numerous arguments not raised below, which need not be considered by this Court. RCW 34.05.554. These arguments are meritless, but some will be briefly addressed here.

a. The City is not excused from establishing all three elements of standing on the basis that it is a governmental subdivision

The City argues, without citing any authority, that its "unique role as a general purpose local government" excuses it from establishing prejudice and redressability as required by RCW 34.05.530. Br. of Appellant, 27. It claims that "private litigants" alone are subject to the "more exacting standings [sic]" requirements of RCW 34.05.530, seeking to distinguish between a governmental agency and a person. *Id.* However, the APA defines "person" broadly to mean "any individual, partnership, corporation, association, *governmental subdivision or unit thereof* . . . ." RCW 34.05.010(14) (emphasis added). Furthermore, the City's argument ignores that RCW 34.05.530 states that a "person has standing to obtain judicial review . . . only when all three" of the standing elements are met. RCW 34.05.530. The City's argument that it may be excused from establishing two of the three standing elements is directly contradicted by the plain language of the statute.

The City claims that to confer a relaxed standing requirement under RCW 34.05.530 for cities "would effectuate the purpose and the construction the Legislature established in adopting [Title 66]." Br. of Appellant, 27. In support of this, the City mistakenly relies upon *Sukin v.*

Wash. State Liquor Control Board, 42 Wn. App. 649, 710 P.2d 814, 816 (1985), *review denied*, 105 Wn.2d 1017 (1986).

In *Sukin*, the City of Spokane decided to file objections when the Sukins applied to renew their liquor license. *Id.* at 650–51. The City was unable to file within the 20 day time limit, but the Board permitted the untimely objections. *Id.* at 651. A hearing was held, and the application for renewal was ultimately denied. *Id.*

At that time, RCW 66.24.010(8) did not specifically authorize the Board to extend the time period for submission of written objections, as the current RCW 66.24.010(8)(c) does, but it also contained no language indicating that failure to file objections within 20 days deprived the Board of jurisdiction to consider them. *Sukin*, 42 Wn. App. at 652. The Sukins argued the Board had no jurisdiction because the objections were untimely. The Court of Appeals stated: "To read such a restriction into the statute would frustrate the purpose of the liquor control act as expressed in RCW 66.08.010." *Sukin*, 42 Wn. App. at 652–53, 710 P.2d at 816.

Sukin thus stands for the proposition that the liquor control act is to be liberally construed to accomplish its own purpose of allowing the Board to protect the welfare, health, peace, morals, and safety of the people. *Id.* at 653, 816. *Sukin* does not stand for the proposition that

Spokane was allowed to file late objections due to its special role as local government; rather it was the Board that was allowed to extend the time to accept the objections due to its "broad and extensive" dominion over liquor. *Id.* at 653. *Sukin* does not stand for the proposition that the standing requirement in the Administrative Procedure Act is to be liberally construed to accomplish the purpose of the liquor control act, as the City asserts.

Lastly, this argument misses its mark as it again conflates a party's rights in the administrative process as somehow conferring the right of the judicial review under RCW 34.05.530.

b. The City does not have associational standing

The City argues that "as a general purpose government," it has associational standing. Br. of Appellant, 28–29. The City asserts its objections reflect those of its citizens and concludes, without factual support or analysis, that its residents would have standing. *Id.* at 29. However, the City fails to address the test for associational standing set forth in *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 97 S. Ct. 2434 (1977).[9] In reality, the residents of Burlington would be

[9] "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the

unable to articulate an injury-in-fact any more than the City is able to. In short, the alleged injuries of the residents would be no less conjectural or hypothetical than the City's, nor could they be redressed, as analyzed above.

c. The Board did not fail to provide a statutorily required hearing

The City argues that it is conferred standing under *Seattle Bldg. and Constr. Trades Council v. The Apprenticeship and Training Council*, 129 Wn.2d 787, 920 P.2d 581 (1996). Br. of Appellant, 29–34. It mistakenly asserts that *Allan v. University of Washington* and *Seattle Bldg. & Constr. Trades Council* "hold[]that a failure of an agency to comply with procedural requirements alone establishes sufficient injury to confer standing." Br. of Appellant, 29 (citing *Allan*, 140 Wn.2d 323, 330, and *Seattle Bldg. & Constr. Trades Council Apprenticeship & Training Council*, 129 Wn.2d 787, 794). The City's reliance on *Allan* and *Trades Council* is misplaced.

The City argues *Trades Council* applies because, "like here, the agency failed to provide for a hearing." Br. of Appellant, 29. The key difference, however, is that the hearing in *Trades Council* was statutorily required, while RCW 66.24.010(8)(d) specifically gives the Board

---

lawsuit." *Hunt v. Washington State Apple Advertising*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441.

discretion with regard to whether or not to hold a hearing.[10] Accordingly, the Board did not "refuse[] to provide a procedure required by statute or the Constitution." *Trades Council*, 129 Wn.2d at 794. The City cannot establish standing under *Trades Council*.

d. The Board raised standing for APA judicial review in the first forum the City sought judicial review

The City argues the Board improperly first raised the issue of standing on appeal. Br. of Appellant, 30. The statute, however, specifically addresses "standing to obtain judicial review of agency action" which was precisely the nature of the proceeding before the superior court. RCW 34.05.530 The first time a party can challenge standing under this provision, therefore, is *on judicial review*, which is where the City first raised the issue of standing and where the Board responded. CP 30–32 and 124–128. In any event, RAP 2.5(a) allows for jurisdictional issues to be raised for the first time on appeal.

In conclusion, the City has failed to meet its burden of establishing standing to obtain judicial review of the agency's decision as required by

[10] The Board's administrative rule implementing this statute refers to only one instance in which a hearing "will" (rather than "may") be granted: when the objection by a local government is based on alleged conduct related to public safety under the liquor control act. WAC 314-07-121(4). Such "public safety" violations include, for example, the sale of liquor to persons under the age of 21. *See* WAC 314-29-020. The City's allegations were not based on public safety violations under the liquor control act but, rather, on conjecture that a liquor license could lead to unnamed crimes and the potential for public safety violations, rather than any allegations of actual conduct.

RCW 34.05.530. The Court should affirm the superior court's order of dismissal.

B. Exclusion of Additional Evidence Submitted After Oral Argument on the Briefs Was Not an Abuse of Discretion

The City argues the superior court abused its discretion when it excluded declarations submitted by the city after oral argument. However, because the superior court only allowed for additional briefing on the issue of standing, rather than additional time to submit additional evidence, the court properly exercised its discretion in excluding the late filed declarations.

This Court has held that a denial of a request to supplement the record under RCW 34.05.562 will be reversed only if it is determined that there was a manifest abuse of discretion. *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 65, 202 P.3d 334, 350 (2009). A trial court abuses its discretion if the "decision is manifestly unreasonable or based on untenable grounds or reasons." *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735, 743 (2010) (citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 647, 654, 71 P.3d 638 (2003)). A "manifestly unreasonable" decision is one "'that no reasonable person would take.'" *Id.* at 458–459 (quoting *Mayer v. Sto Indus.*, 156 Wn.2d at 684).

At the close of oral argument, Judge Schaller determined she wished to further examine the issue of whether the City had standing. Judge Schaller gave the parties the opportunity to file supplemental briefing on the issue of standing, limited to five pages. 7/19/2013 Hearing, RP 40. The Board and Hakam Singh each filed a Supplemental Brief on Standing. CP 182–187, 173–181. The City filed declarations, consisting of eleven pages, seeking to factually supplement the record. CP 153–166. The Board filed a Motion to Strike the declarations as an improper attempt to supplement the record with additional evidence in a judicial review of an adjudicative proceeding. CP 188–192. The superior court granted the Motion to Strike, finding the attempt to supplement the record was untimely. 8/23/2013 Hearing, RP 23.

The City argues that the superior court improperly reversed its own decision to allow the parties to supplement the record. Br. of Appellant, 36. This argument is inaccurate and therefore meritless. The superior court clarified at the hearing on the Motion to Strike that the request for supplemental briefing on the issue of standing was not an invitation to factually supplement the record with declarations. 8/23/2013 Hearing, RP 20–21. The superior court did not reverse its decision; the city merely misunderstood the original offer from the court to accept additional briefing.

The City also incorrectly argues it was abuse of discretion for the court to strike the declarations. Br. of Appellant, 37–39. In support, the City cites case law and statutory authority wherein courts are "allowed" to admit additional evidence on standing. Br. of Appellant, 37–39, *citing Wash. Independent Tel. Ass'n v. Wash. Util. & Transp. Comm'n*, 110 Wn. App. 498, 518, 41 P.3d 1212 (2002), *affirmed* 149 Wn.2d 17, 65 P.3d 319 (2003); *Children's Hosp. & Med. Ctr. v. Dep't of Health*, 95 Wn. App. 858, 863, 975 P.2d 581 (1999), *review denied*, 139 Wn.2d 1021 (2000); *Trades Council*, *supra* at 798–99; *Martini v. Post*, 178 Wn. App. 153, 313 P.3d 473 (2013). The cases cited, however, do not stand for the proposition that the admission of such evidence is mandated and refusal to do so is an abuse of discretion. Rather, they state that admission of such evidence is permissible and that the introduction of such evidence is not an abuse of discretion. *See Wash. Indep. Tel. Ass'n v. Wash. Util. & Transp. Comm'n*, 110 Wn. App. 498, 518, 41 P.3d 1212 (2002), *affirmed* 149 Wn.2d 17, 65 P.3d 319 (2003) (holding additional evidence is *admissible* if it is needed to decide disputed issues of material fact not required to be determined on the agency record); *Children's Hosp. & Med. Ctr. v. Dep't of Health*, 95 Wn. App. 858, 863, 975 P.2d 581 (1999), *review denied*, 139 Wn.2d 1021 (2000) (holding additional evidence *allowed* where only evidence in record is a single letter); *Trades Council*, *supra* at 798–99;

Martini v. Post, 178 Wn. App. 153, 313 P.3d 473 (2013) (holding decision of whether to consider additional evidence is *within the court's discretion*).

Moreover, the superior court did not unreasoningly refuse to consider any additional evidence regarding standing, as the City suggests. Rather, the trial court exercised its authority to manage its courtroom in making the unremarkable decision to disallow additional evidence after initial briefing and oral argument had been completed. The superior court reasoned the City knew standing was a requirement of the judicial review process when it addressed the issue in its opening brief. 8/23/2012 Hearing, RP 22. The City's opening brief in superior court analyzed standing under the APA, devoting several pages and analyzing each prong of the test independently. CP 30–32. The court stated it would have considered any additional declarations to supplement the record on the issue of standing if the City had sought to supplement the record at that time, but "[c]learly the City believed that they had sufficient evidence at that time to support the issue of standing and that, if they didn't, they would have filed additional declarations to supplement the record on the issue of standing as it relates to the matter before the court." 8/23/2012 Hearing, RP 22. The court stated the City was further on notice standing was an issue when the Board's Response Brief argued the City lacked

standing. *Id.* The court concluded that if the City had filed supplemental declarations with the City's Reply Brief, it would have overruled any objections and considered them at that time.

The superior court, therefore, ruled consistently with the case cited by the City, *Nw. Envt'l Defense Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527–28 (9th Cir. 1997), which held the petitioner was "entitled to establish standing anytime during the briefing phase." Br. of Appellant, 38. Here, where the City was well aware standing was an issue at all points in the briefing phase, the superior court would have accepted the supplemental declarations with either of the City's briefs. But the City did not attempt to introduce the declarations until after oral argument on the briefs, well outside the briefing period. The superior court's decision was well reasoned and not "a view no reasonable person would take" and is, therefore, not manifestly unreasonable. *See Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458–59, 229 P.3d 735, 743 (2010) (citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 647, 654, 71 P.3d 638 (2003)).

The City's argument that it was the Board's failure to file a motion to dismiss that prevented it from previously filing declarations is also without merit. The City cites to RCW 34.05.562 to argue a court is able to receive additional evidence. Setting aside the fact that the statute allows a court to receive evidence "only if it relates to the validity of the agency

action at the time it was taken," RCW 34.05.562(1), the statute does not require a Respondent to bring a motion before a Petitioner can seek to supplement the record. Furthermore, the City again improperly translates a permissive ability into a mandate. The statute states a court "may" receive additional evidence not that it is required to do so. RCW 34.05.562(1).

The superior court properly exercised its discretion in granting the Board's Motion to Strike the supplemental factual declarations the City sought to submit after oral argument on the merits of the case.

C. The Board Had the Authority to Interpret an Ambiguous Statute and Formulate an Interim Policy to Give Meaning to the Mandates in Initiative 1183

Since the City lacks standing to challenge the Board's decision, this Court does not need to address whether the Board had authority to develop a policy on the relocation of liquor stores.[11] Even if this Court addresses this issue, given the ambiguity and nature of the language at issue, the Board properly interpreted I-1183 and had the authority to allow relocation. Moreover, even if this Court finds the language unambiguous, the Court may depart from a literal construction where the result would be absurd. Lastly, the Board was not required to engage in rule making.

[11] The City asserts that the superior court "ruled" that the Board lacked the authority to allow relation. Br. of Appellant, 18. The superior court, however, made clear that standing is a "threshold question" and no rulings on the merits can be made without a finding that standing exists. 8/29/2013 Hearing, RP 32.

The burden of demonstrating the invalidity of agency action is on the party asserting invalidity. RCW 34.05.570(1)(a) and *Nw. Sportfishing Industry Ass'n v. Wash. Dep't of Ecology*, 172 Wn. App.72, 90, 288 P.3d 677, 686–87 (2012). Furthermore, the court may only grant relief where it determines that the "person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d) and *In re Martin*, 154 Wn. App. 252, 260, 233 P.2d 1221, 1225 (2009), *review denied* 169 Wn.2d 1002, 236 P.3d 205. This requirement of "substantial prejudice" is separate and discrete from that in the standing requirement of RCW 34.05.530(1). Facially, the judicial review statute requires a higher showing of prejudice, requiring "substantial prejudice," as opposed to the prejudice or likely prejudice required by the standing requirement. *Compare* RCW 34.05.570(1)(d) and RCW 34.05.530(1). Where the City has failed to make a showing that it was prejudiced by the agency action under the standing requirements, it follows that the City fails to make a showing that it has been *substantially* prejudiced by the agency action.

1. The Board's interim policy is not precluded by the statutory language in I-1183 because it construes ambiguous language and avoids absurd results

The Court's primary goal in interpreting statutes is to discern and implement the intent of the legislation. *E.g., Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The

Court determines this intent from examining the language of the statute and related statutes. *Id.* In doing so the court should also take into consideration "background facts of which judicial notice can be taken." *Id.* "The meaning of words in a statute is not gleaned from those words alone but from all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another." *Burns v. City of Seattle*, 161 Wn.2d 129, 146, 164 P.3d 475 (2007). "In undertaking this plain language analysis, the court must remain careful to avoid 'unlikely, absurd or strained' results." *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82, 84 (2005). In this case, a close review of the statute, which includes consideration of related statutes and the background facts, reveals that it is not clear and applying a literal interpretation would produce an absurd result.

Under I-1183, the Board was directed to:

> [S]ell by auction open to the public the right at each *state-owned store location* of a spirits retail licensee to operate a liquor store upon the premises . . . . Acquisition of the operating rights must be a precondition to, but does not establish eligibility for, a spirits retail license at the location of a state store.

I-1183 § 102(4)(c), *codified as* RCW 66.24.620(4)(c) (emphasis added). However, the language of the initiative was inaccurate because the Board did not own any locations or premises, it leased them. The Board thus needed to interpret the meaning of "state-owned store location" and "premises" to give meaning to the statute.

Where a statute is ambiguous, principles of statutory construction may provide guidance. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196, 200 (2005). One such principle requires statutes to be construed so that "'all the language is given effect, with no portion rendered meaningless or superfluous.'" *Id.* at 624 (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). A literal interpretation of the statute would result in rendering other portions of the statute meaningless.

In addition to the requirement that the Board auction the right of a spirits retail licensee to operate a liquor store upon the premises of a "state owned store location," the Board also was directed by the statute to obtain "maximum reasonable value" for the assets it auctioned off. RCW 66.24.620(4)(b). Furthermore, the auctioned right to operate a liquor store was required to be "freely alienable and subject to all state and local zoning and land use requirements." RCW 66.24.620(4)(c).

Although the Board generally can only issue spirits retail licenses for premises of at least 10,000 square feet, I-1183 §103, *codified as* RCW

66.24.630(3)(a), there is an exception to this minimum square footage requirement for holders "of former state liquor store operating rights sold at auction . . . ." I-1183 §103, *codified as* RCW 66.24.630(3)(c). The Board recognized the valuable right to operate stores that could be less than 10,000 square feet of retail space, but was required by statute to structure the terms of the auction so as to maximize the value it could obtain for selling that right. The Board also was required by statute to structure the right so that it could be "freely alienable." I-1183 § 103, *codified as* RCW 66.24.630(3)(a) and (c). Thus in order to maximize the value, and make the right freely alienable, the Board determined that when a holder of such operating rights was unable to operate a spirits retail store at the former state store that was less than 10,000 square feet (for example, if the landlord would not lease the premises), it would permit the holder to relocate to another location that was also less than 10,000 square feet. BIP-04-2012, CP 137. If there were no assurance that a successful bidder would likely be able to ultimately operate a liquor store because of the uncertainty of obtaining a lease at the former state store locations, the auctioned operating rights would be of little value, and the Board would have been unable to obtain "maximum reasonable value." The option to relocate helped the Board obtain "maximum reasonable value."

The City argues that "it is of no moment" if the auction winner is unable to exercise the right it has purchased, citing the language that "[a]cquisition of the operating rights must be a precondition to, but does not establish eligibility for, a spirits retail license at the location of a state store." I-1183 § 102, *codified as* RCW 66.24.620(c); Br. of Appellant, 41. It is true that the purchase of the operating right cannot automatically confer eligibility for a retail license, because a liquor license is a privilege, and not a right or an asset that may be sold at auction. *Arndt v. Manville*, 53 Wn.2d 305, 310, 333 P.2d 667, 669 (1958). But the City fails to acknowledge that a right—purchased at auction—to operate a liquor store at a certain location has significant value even if the purchaser is later denied a license, because the right must be "freely alienable" and thus could be re-sold. I-1183 § 103, *codified as* RCW 66.24.630(3)(a) and (c). In contrast, if successful bidders were guaranteed neither a license *nor* a location to operate a liquor store, the purchased "right" would be nearly meaningless. This would lead to an unduly harsh and absurd result for the auction bidders and would not have enabled the Board to obtain "maximum reasonable value" for the operating rights.

Even if this Court determines that the language in section 102 is unambiguous despite the terms in related statutes and the background fact that the State did not own any liquor stores when I-1183 was passed, the

Board's interim policy allowing relocation should be upheld. This Court is justified in departing from a purely literal construction as otherwise an absurd and unjust result that would be inconsistent with the purposes and policies of I-1183 would result. "[D]eparture from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act in question." *State v. McDougal*, 120 Wn.2d 334, 351, 841 P.2d 1232 (1992) (quoting 2A N. Singer, *Statutory Construction* § 45.12 (4th ed. 1984)). Here, the Board had no ability to auction off the rights at the specific "location" and "premises" because the Board did not own the locations. *See* AR 1–8. A literal reading would confer an ephemeral right on the successful bidder, which may have no value depending on the amenability of the landlord. Furthermore, a literal reading would mean that an auction winner would be limited to the exact footprint of the former state store, prohibiting any ability to expand or reduce the size of the premises in perpetuity. Accordingly, the Board's interim policy is consistent with I-1183, and a valid implementation of its statutory requirements.

2. Where statutory language is ambiguous, the Court should defer to the Board's interpretation

After considering related statutes and background facts as discussed above, the Court should find the statute was ambiguous. If the statute is ambiguous then the court should defer to the Board's interpretation of the statute because the Board has expertise in the area. *Waste Mgmt. of Seattle, Inc. v. Utils. and Transp. Com'n*, 123 Wn.2d 621, 869 P.2d 1034 (1994). A challenge to the Board's interpretation of the statute is reviewed de novo while giving "substantial weight" to the agency's interpretation. *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.* 154 Wn.2d 224, 233, 110 P.3d 1132, 1137 (2005); *St. Joseph Hosp. and Health Care Ctr v. Dep't of Health*, 125 Wn.2d 733, 743, 887 P.2d 891, 896 (1995) ("[C]onstruction given [to] a statute by the administering agency is entitled to considerable weight.").

The Board has a lengthy history of applying and interpreting the liquor laws amended by I-1183. In particular, the Board has a long history of considering the location of liquor stores that the Board itself operated from 1934 to 2012 along with a history of considering the interests of local jurisdictions related to the location of businesses licensed to sell liquor throughout the state. It has special expertise in applying and

interpreting the state's liquor laws, and its interpretations should be afforded substantial weight.

3. The Board properly promulgated an interim policy to give notice to the public of how it would interpret and handle the statute's ambiguity

The Board properly implemented an interim policy, which was not a rule. Agencies are "accorded 'wide discretion' when deciding to forgo rulemaking." *Nw. Sportfishing Indus. Ass'n v. Wash. Dep't of Ecology*, 172 Wn. App. 72, 91, 288 P.3d 677 (2012). Here, the determination to forgo rulemaking was appropriately made given that this was a wholly new process being implemented, a process unlikely to be repeated and one that applied to only a handful of auction winners.

The City incorrectly refers to a "one mile radius rule" and argues that the "rule" was not adopted in compliance with the APA. Br. of Appellant, 46–47. However, the Board's interim policy, BIP-04-2012, Relocation of Former State Liquor Stores,[12] was not a rule, nor was the Board required to promulgate rules to effectuate the auction requirements in I-1183 to auction off, for maximum reasonable value, the right to operate a state owned liquor store at the "state-owned" store location. RCW 66.24.620(4)(b)–(c).

[12] The Board's policy is attached as Exhibit A to the Declaration of Mary M. Tennyson (Tennyson Decl.). CP 133–137. The Auction Terms and Conditions also recited the salient aspects of the policy.

The interim policy implemented the auction requirements in the manner that best advised the public of the Board's planned course of action with regards to a wholly new process. The APA contemplates agencies' use of policies without formal rule-making. A "policy statement" is defined under the APA as a written description of the agency's current approach to the implementation of a statute, including the agency's current practice or procedure based on that approach. RCW 34.05.010(15). Agencies are specifically "encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements." RCW 34.05.230(1). On the other hand, a "rule" is defined as:

> any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; (c) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (e) which establishes, alters, or revokes any mandatory standards for any product or material which must be met before distribution or sale.

RCW 34.05.010(16).

The critical difference between a policy and a rule is whether a binding effect is intended. *See* Wash. State Bar Ass'n, *Wash. Admin. Law*

Practice Manual 7.04 (2000); *see also Wash. Educ. Ass'n v. Public Disclosure Comm'n*, 150 Wn.2d 612, 619, 80 P.3d 608 (2003) (interpretive statement has no legal or regulatory effect). The language of the policy statement makes clear it is not intended to be binding in the way a rule is. Not only does the policy include an exception to allow relocation beyond the one-mile radius, it states that "[a]s geographic and/or economic conditions change, the Board should revisit these criteria to ensure it is effectively guiding decisions in a manner consistent with the Mission of the agency." BIP-04-2012, CP 137.

Furthermore, the policy was clearly not a rule, as it was not one of "general applicability" as contemplated by RCW 34.05.010(16). The policy applied only to a small subset of auction winners who could not come to an agreement with the land lord. Furthermore, the policy applied only to the auction of the liquor store operating rights, which was to be a one-time event. In *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 835 P.2d 1030 (1992), the court declared Ecology's numeric standard for the discharge of dioxin to be a rule of general applicability because the standard was one the employees were bound to apply uniformly to the "entire class of entities." The court relied on the fact that the record showed department officials relied on the numeric standard as a "uniform standard" that they were bound to apply and where entities that

were not in compliance would be in violation of state law. *Id.* at 644. Here, the record does not support a similar finding. The policy statement was clearly written to reflect that it was intended to encapsulate evolving criteria and standards as this wholly new process was implemented and its effects were seen. Furthermore, the language of the policy did not bind the Board to allow relocation as it refers to the "*evaluation*" of relocation *requests*. BIP-04-2012, CP 136-37.

The City has failed to meet its burden of proving the invalidity of the agency action and, moreover, has been unable to show that it has been substantially prejudiced by the action.

V. CONCLUSION

The superior court was correct in finding the City lacked standing to seek judicial review under the APA. The City's objection to the location provided no factual support or evidence to prove that it suffered a concrete injury. Any prejudice or likely prejudice was speculative and hypothetical. The City also failed to show that a reversal of the Board's grant of the license will redress any prejudice the decision has caused. Additionally, the superior court's decision strike the factual declarations provided after the conclusion of the briefing period was not manifestly unreasonable and therefore not abuse of its discretion.

Finally, even if the City had standing to obtain judicial review of the Board's action, the Board's order was valid and should be affirmed. The Board respectfully asks the Court to affirm the superior court's order of dismissal.

RESPECTFULLY SUBMITTED this 28th day of April, 2014.

ROBERT W. FERGUSON
Attorney General

R. JULY SIMPSON, WSBA 45869
Assistant Attorney General

MARY M. TENNYSON, WSBA 11197
Senior Assistant Attorney General

Office ID 91029
PO Box 40110
Olympia, WA 98504-0110
360-753-2702

PROOF OF SERVICE

I, Dianne S. Erwin, certify that I served a copy of this document on all parties or their counsel of record on the date below by US Mail Postage Prepaid via Consolidated Mail Service and as follows to:

Philip A. Talmadge
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630

Corbin Volluz
Law offices of Corbin Volluz
508 South Second Street
Mount Vernon, WA 98273-3819

Scott G. Thomas
City of Burlington
833 S. Spruce St.
Burlington, WA 98233-2810

Filed Electronically with:

Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300, MS TB-06
Tacoma, WA 98402-4454

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28 day of April, 2014, at Olympia, Washington.

DIANNE S. ERWIN, Legal Assistant

shall deliver liquor within the state; and the time and periods when, and the manner, methods and means by which liquor may lawfully be conveyed or carried within the state;

(t) providing for the making of returns by brewers of their sales of beer shipped within the state, or from the state, showing the gross amount of such sales and providing for the inspection of brewers' books and records, and for the checking of the accuracy of any such returns;

(u) providing for the making of returns by the wholesalers of beer whose breweries are located beyond the boundaries of the state;

(v) providing for the making of returns by any other liquor manufacturers, showing the gross amount of liquor produced or purchased, the amount sold within and exported from the state, and to whom so sold or exported, and providing for the inspection of the premises of any such liquor manufacturers, their books and records, and for the checking of any such return;

(w) providing for the giving of fidelity bonds by any or all of the employees of the board: PROVIDED, That the premiums therefor shall be paid by the board;

(x) providing for the shipment by mail or common carrier of liquor to any person holding a permit and residing in any unit which has, by election pursuant to this title, prohibited the sale of liquor therein;

(y) prescribing methods of manufacture, conditions of sanitation, standards of ingredients, quality and identity of alcoholic beverages manufactured, sold, bottled, or handled by licensees and the board; and conducting from time to time, in the interest of the public health and general welfare, scientific studies and research relating to alcoholic beverages and the use and effect thereof;

(z) seizing, confiscating and destroying all alcoholic beverages manufactured, sold or offered for sale within this state which do not conform in all respects to the standards prescribed by this title or the regulations of the board: PROVIDED, Nothing herein contained shall be construed as authorizing the liquor board to prescribe, alter, limit or in any way change the present law as to the quantity or percentage of alcohol used in the manufacturing of wine or other alcoholic beverages. [2002 c 119 § 2; 1977 ex.s. c 115 § 1; 1971 c 62 § 1; 1943 c 102 § 1; 1933 ex.s. c 62 § 79; RRS § 7306-79. Formerly RCW 66.08.030 and 66.08.040.]

***Reviser's note:** RCW 66.16.080 was repealed by 2005 c 231 § 6.

66.08.050 Powers of board in general. The board, subject to the provisions of this title and the rules, shall:

(1) Determine the localities within which state liquor stores shall be established throughout the state, and the number and situation of the stores within each locality;

(2) Appoint in cities and towns and other communities, in which no state liquor store is located, contract liquor stores. In addition, the board may appoint, in its discretion, a manufacturer that also manufactures liquor products other than wine under a license under this title, as a contract liquor store for the purpose of sale of liquor products of its own manufacture on the licensed premises only. Such contract liquor stores shall be authorized to sell liquor under the guidelines provided by law, rule, or contract, and such contract liquor stores shall be subject to such additional rules and regulations consistent with this title as the board may require;

(3) Establish all necessary warehouses for the storing and bottling, diluting and rectifying of stocks of liquors for the purposes of this title;

(4) Provide for the leasing for periods not to exceed ten years of all premises required for the conduct of the business; and for remodeling the same, and the procuring of their furnishings, fixtures, and supplies; and for obtaining options of renewal of such leases by the lessee. The terms of such leases in all other respects shall be subject to the direction of the board;

(5) Determine the nature, form and capacity of all packages to be used for containing liquor kept for sale under this title;

(6) Execute or cause to be executed, all contracts, papers, and documents in the name of the board, under such regulations as the board may fix;

(7) Pay all customs, duties, excises, charges and obligations whatsoever relating to the business of the board;

(8) Require bonds from all employees in the discretion of the board, and to determine the amount of fidelity bond of each such employee;

(9) Perform services for the state lottery commission to such extent, and for such compensation, as may be mutually agreed upon between the board and the commission;

(10) Accept and deposit into the general fund-local account and disburse, subject to appropriation, federal grants or other funds or donations from any source for the purpose of improving public awareness of the health risks associated with alcohol consumption by youth and the abuse of alcohol by adults in Washington state. The board's alcohol awareness program shall cooperate with federal and state agencies, interested organizations, and individuals to effect an active public beverage alcohol awareness program;

(11) Perform all other matters and things, whether similar to the foregoing or not, to carry out the provisions of this title, and shall have full power to do each and every act necessary to the conduct of its business, including all buying, selling, preparation and approval of forms, and every other function of the business whatsoever, subject only to audit by the state auditor: PROVIDED, That the board shall have no authority to regulate the content of spoken language on licensed premises where wine and other liquors are served and where there is not a clear and present danger of disorderly conduct being provoked by such language. [2005 c 151 § 3; 1997 c 228 § 1; 1993 c 25 § 1; 1986 c 214 § 2; 1983 c 160 § 1; 1975 1st ex.s. c 173 § 1; 1969 ex.s. c 178 § 1; 1963 c 239 § 3; 1935 c 174 § 10; 1933 ex.s. c 62 § 69; RRS § 7306-69.]

Severability—1975 1st ex.s. c 173: "If any phrase, clause, subsection, or section of this 1975 amendatory act shall be declared unconstitutional or invalid by any court of competent jurisdiction, it shall be conclusively presumed that the legislature would have enacted this 1975 amendatory act without the phrase, clause, subsection, or section so held unconstitutional or invalid and the remainder of the act shall not be affected as a result of said part being held unconstitutional or invalid." [1975 1st ex.s. c 173 § 13.]

Effective date—1975 1st ex.s. c 173: "This 1975 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1975." [1975 1st ex.s. c 173 § 14.]

Severability—1963 c 239: See note following RCW 66.08.026.

WASHINGTON STATE ATTORNEY GENERAL

April 28, 2014 - 3:56 PM

Transmittal Letter

Document Uploaded: 455650-Respondent's Brief.pdf

Case Name: City of Burington v. WA State LCB

Court of Appeals Case Number: 45565-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Dianne S Erwin - Email: Diannee1@atg.wa.gov

A copy of this document has been emailed to the following addresses:

RJulyS@atg.wa.gov